



*ASA Conference*  
*Multi Tier Dispute Resolution*  
*Practical Issues – Practical Solutions*

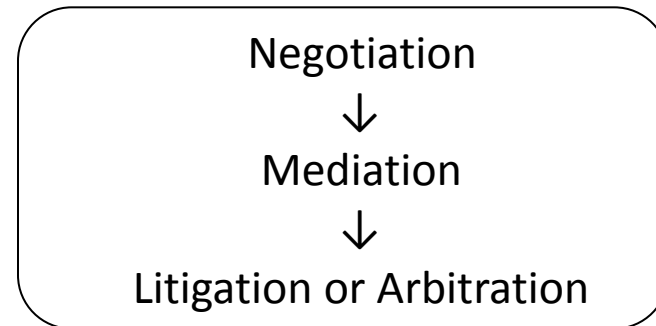
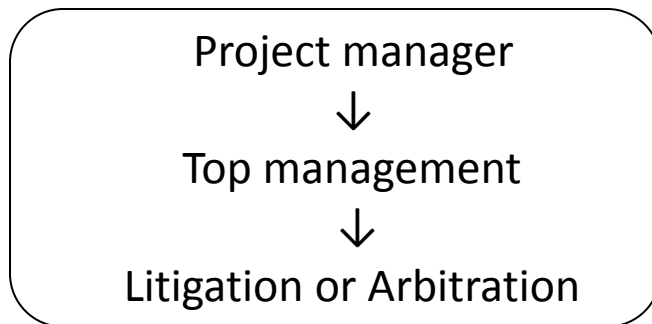
## **Consequences of Non-Compliance** **- Japan, China & Singapore**

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## Multi-Tiered Dispute Resolution Clauses in Asia

- Asian culture: Resolving disputes through good faith negotiations
- Multi-tiered dispute resolution clause: Popular in Asia

Escalation clause    Pre arbitration mediation



- Validity and enforceability of multi-tiered dispute resolution clauses is diverse among Asian jurisdictions.

# Japan

## ***Typical dispute resolution clause in Japan***

- A good faith negotiation clause in a Japanese contract:

*“When an issue that has not been provided for in this agreement arises in the future the parties shall negotiate in good faith to deal with such issue.”*

- A typical dispute resolution clause in a Japanese contract:

*“Any dispute which may arise between the parties in connection with this Agreement shall be settled amicably between the parties. If the parties are unable to settle a dispute amicably such dispute shall be referred to and finally settled by arbitration in [Tokyo] under the arbitration rules of the [JCAA].”*

## **Japan - *Mediation as pre-condition to litigation is valid but not enforceable***

### ***Elpida Memory v. Hitachi, NEC, Tokyo High Court decision, 22 June 2011***

The High Court refused to dismiss the case based on Plaintiff's failure to comply with a pre-litigation mediation clause.

### ***Multi-tiered dispute resolution clause***

Step 1: The Parties shall conduct good faith negotiations for 60 days.

Step 2: A Party may submit the matter to a neutral mediator within 30 days.

Step 3: A Party may request the JCAA to appoint a mediator if the Parties fail to agree on a mediator.

Step 4: If mediation does not fully resolve the dispute the Parties may initiate litigation.

## Japan - *Mediation as pre-condition to litigation is valid but not enforceable*

### *Elpida Memory v. Hitachi, NEC*

#### **Facts**

- 29.01.2009 Plaintiff sought payment from Hitachi and NEC
- *February, March 2009* *Plaintiff's claim time-barred if lawsuit had been dismissed*
- 24.07.2009 Plaintiff initiated court annexed mediation
- 12.01.2010 Court annexed mediation failed
- 25.01.2010 Plaintiff filed lawsuit against Defendant
- 08.12.2010 Tokyo District Court dismissed the case due to Plaintiff's failure to mediate which was a condition precedent to litigation.
- 01.10.2010 Plaintiff initiated private mediation

## **Japan - *Mediation as pre-condition to litigation is valid but not enforceable***

### ***Elpida Memory v. Hitachi, NEC***

#### ***Reasoning of the Tokyo High Court decision***

General observations:

- A right to litigate is a fundamental right and reluctant to enforce pre litigation obligation.
- Consistency with ADR law which is extremely reluctant to restrict a right to litigate.  
When a party initiates litigation despite an agreement to mediate the court may stay litigation proceedings for up to four months, but not dismiss the lawsuit, upon the parties' joint application to stay the litigation.

Specific consideration: If the court had dismissed lawsuit:

- Plaintiff's claim would have been partially time bared.
- Plaintiff would have been forced to pay court fees twice (approximately 150,000 USD) if mediation fails.

**Singapore - *Multi-tiered dispute resolution clause is valid and enforceable but must be strictly complied with.***

***International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another***  
**[2013] SGCA 55**

The court found that the clause is clear enough to be valid and enforceable. However, the court set aside the Tribunal's jurisdictional decision due to Lufthansa's failure to comply with pre arbitration negotiation clause.

***Multi-tiered dispute resolution clause***

Any dispute between the Parties relating to or in connection with this agreement shall be referred:

Step 1: to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion;

Step 2: to a committee consisting of Datamat's designee and Lufthansa Systems' Director Customer Relations; and

Step 3: to a committee consisting of Datamat's designee and Lufthansa Systems' Managing Director, and

Step 4: if the matter remains unresolved the dispute may be referred to arbitration.

**Singapore - *Multi-tiered dispute resolution clause is valid and enforceable but must be strictly complied with.***

***International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another***  
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### ***Facts***

At least seven meetings were held between the parties between 2005 and 2007 before arbitration was initiated.

### ***Rulings***

The multi-tiered dispute resolution clause: *valid and enforceable* because:

- Clause is clear
- It sets out mandatory fashion
- With specificity

Precondition to arbitration was *not fulfilled* because:

- Personnel with the title and hierarchy designated in the multi-tiered dispute resolution clause was not involved in the negotiation. The Parties contemplated that any dispute would be escalated up the hierarchies of the respective parties with representatives of increased seniority and simple meetings between some people of the respective organization, discussing a variety of matters, would not suffice.



## ***China - Court reluctant to set aside award due to failure to meet multi-tiered dispute resolution clause***

***Shenzhen Mawan Power Co. v. Run He Development Ltd. Co., the Supreme Court Decision, 8 May 2008***

The Supreme Court enforced an arbitral award, dismissing the Respondent's allegation that arbitration was premature due to the Claimant's alleged failure to comply with a pre-arbitration negotiation clause.

### ***Multi-tiered dispute resolution clause***

*“Any dispute which may arise between the parties in connection with the performance of this Agreement shall be settled amicably between the parties. If the parties are unable to settle a dispute amicably such dispute shall be referred to and finally settled by arbitration in CIEATAC Shenzhen division. An arbitration award shall be final and binding upon the parties.”*

## ***China - Court reluctant to set aside award due to failure to meet multi-tiered dispute resolution clause***

***Shenzhen Mawan Power Co. v. Run He Development Ltd. Co., the Supreme Court Decision, 8 May 2008***

### ***Facts***

The parties disputed over whether or not the parties negotiated in good faith prior to the arbitration.

### ***Rulings***

A pre-arbitration negotiation clause lacks specificity without any specific time limits for negotiation.

A pre-arbitration negotiation clause consists of two elements: amicable negotiation and a failure to agree. While the parties dispute as to whether or not the parties amicably negotiated the fact that the claimant initiated arbitration itself suggests that the parties failed to reach settlement. Accordingly even when the court is unable to ascertain whether the parties negotiated amicably a party may initiate arbitration so long as the second element is met and the second element is deemed to be met base on an filing of arbitration request.

## Lessons to be learned in Asia

Drafting a multi-tiered dispute resolution clause:

- ✓ *Unequivocal*
- ✓ *Specific: time limit, specific parties, mandatory nature*

Implementing a multi-tiered dispute resolution clause:

- ✓ *Strictly comply with each step*

Enforcing an arbitral award under a multi-tiered dispute resolution clause:

- ✓ *Examine whether the clause is unequivocal, specific and mandatory or not*
- ✓ *May not be enforced in certain jurisdictions, such as Japan*

***Thank you***

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